89-414

Supreme Court, U.S.
FILED
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CLERK

NO. _____
Spring 1989

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UNITED STATES SUPREME COURT

JOHN F CASTELLA, Petitioner

v.

JOHN E LONG, personally and in his Official Capacity as Commander, HAROLD D LYNCH, Personally and in his Official Capacity as Senior Management Official, ARMY AND AIR FORCE EXCHANGE SERVICE, THE UNITED STATES DEPARTMENT OF THE ARMY, and THE UNITED STATES OF AMERICA, Respondents

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Petition for Writ of Certiorari

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457 pp

## QUESTION PRESENTED

Do procedures established by a Non Appropriated Fund Entity of the United States Government, which do not comply with the mandated statutory procedures of the C. S. R. A. provide "Due Process" when the taking of a liberty and property right, guaranteed by the Fifth Amendment of the U. S. Constitution, is appealed?

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

JOHN F CASTELLA, Petitioner

v.

JOHN E LONG, personally and in his Official Capacity as Commander, HAROLD D LYNCH, Personally and in his Official Capacity as Senior Management Official, ARMY AND AIR FORCE EXCHANGE SERVICE, THE UNITED STATES DEPARTMENT OF THE ARMY, and THE UNITED STATES OF AMERICA, Respondents

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Petition for Writ of Certiorari

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Petitioner, John F. Castella, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 23, 1989.

## OPINIONS BELOW

The Judgement and Opinion of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Northern District of Texas,was entered on 21 Nov.1988,[App A]. Motion for rehearing thereof was denied by order dated 23 January 1989 [App B]. The Decision of the United States District Court for the Northern District of Texas was issued on April 29, 1988 [App C]. The Decision of the Appellant Authority, Army and Air Force Exchange Service was issued on 2 December, 1986. [App D].

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U. S.C. 1454 (1). Jurisdiction of the United States Court of Appeals was pursuant to 28 U. S. C. 1291 and Rule 4 FRAP.

Jurisdiction of the United States District Court was pursuant to 28 U.S.C. 2201, 28 U.S.C. 1331, The Fifth Amendment to the United States Constitution, 5 U.S.C. 552a (g)(1) and (5)5 U.S.C. 701, et.seq. Jurisdiction of the Appellant Authority was pursuant to Army/Air Force Regulation 60-21/147-15.

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

"nor shall any person. be deprived of life, liberty, or property, without due process of law..."

## STATEMENT OF THE CASE

### I. Proceedings in the Courts Below

Petitioner John F. Castella was a career executive with 24 years commendable service with the Army and Air Force Exchange Service, an Instrumentality of the United

States Government,and also a Non Appropriated Fund of the Departments of the Army and Air Force. This Agency of the United States Government operates as a multi-billion dollar entity of the military departments with almost total autonomy. The Congressional Safeguards provided by the Civil Service Regulations to government employees are not available to the Army and Air Force Exchange Service (AAFES) employees. Petitioner was terminated for submitting fraudulent expense vouchers. In August of 1985 Mr. Castella was transferred,at the direction of the AAFES, from Fort Devens, Mass. to Dallas Texas. Subsequent to the transfer Mr. Castella submitted five expense vouchers with estimated expenses which exceeded the dollar amount authorized by the agency. He further submitted receipts for food which were prepared by him as estimates of expenses at particular restaurants. Upon submission, he informed the agency that the

receipts were estimates. Investigation revealed that the receipts were not accurate. Mr. Castella was provided with a letter of termination identifing receipt discrepancies as falsification of government documents. The letter further stated that all five vouchers were fraudulent, without identifing any entries on the vouchers deemed specifically fraudulent. AAFES concluded that the average expense for meals was fraudulent therefore all entries were fraudulent and falsified. Petitioner received an internal hearing which confirmed the termination. During the Hearing, the petitioner produced notorized statements from numerous restaurants to verify both dollar value, number of people eating, and locations of food expenses which supported the claims. These were ignored by the Hearing Examiner. Petitioner filed a suit which included Privacy Act violations, personal liability and a review of the agency action.

The United States District Court for the Northern District of Texas dismissed the first six counts and ruled that "extensive administrative procedure followed in this case more than adequately protected Plantiff's rights under the constitution, laws, and regulations" in count 7. ( review of Agency decision pursuant to 5 U.S.C. 701 et seq.) The United States Court of Appeals, Fifth District affirmed this decision and denied a rehearing

## II. Facts Relevant to this Petition

Contrary to procedures identified by law for termination of civil service employees(see 5 U.S.C. sec. 7513,7701,7703), AAFES conducted a lengthy internal hearing held by a hearing examiner (not an administrative law judge) pursuant to Army Regulation (AR) 60-21/Air

Force Regulation (AFR) 147-15. The hearing examiner was beholden to the Senior Mahagement Official who initiated the termination action and the Appellant Authority who approved the termination action. Furthermore, the legal offices of the AAFES were not only the "adversarial" personnel who represented management in the hearing but also the "Office of Legal Review" for the appellant authority who approved the report of the hearing examiner. Subsequently, the Appellant Authority, who originally indicated to the Senior Management Official (prior to his action to terminate) that a serious breach of rules was committed by the plaintiff, denied the Plaintiff's appeal.

Furthermore, the regulatory procedures identified in AR 60-21/AFR 147-15 require specific allegations in order for the

plaintiff to be able to respond specifically. The hearing examiners findings concluded that the plaintiff had done five "specific" things wrong, four of which were not included in the "notice" required by the regulations. Neither the Hearing Examiner, the District Court nor the Appellate Court considered these findings "general allegations". Their reviews indicate that the "general allegations" were not considered by the Hearing Examiner. Under Civil Service Regulations, steming from 5 U.S.C. 7513,7701,7703, these specific findings would not have been allowed. The allegation which was in the original notice and found to be specifically correct included identification of a "Daily Room Expense" on the voucher which was not adjusted for a credit provided by the motel. The supporting document provided with the voucher had the credit identified on it. The voucher

should have been adjusted by the AAFES in their review,as testified by the clerk at the hearing.

In view of the foregoing facts,this petitioner requests that the safeguards provided by Civil Service Laws be provided to the 20,000 personnel employed by the AAFES, none of whom are now subject to a government procedure which insures "Due Process". The ability of the AAFES to decide, independently, that an employee is guilty of fraud, publish this information, and take away a liberty and property right of that employee, by termination of the employee, is a violation of the due process provisions of the U.S.Constitution and the Administrative Procedure Act.

## LEGAL ARGUMENT JUSTIFYING WRIT OF CERTIORARI

The regulatory procedure which provides for an internal formal hearing by a hearing examiner who is directly beholden to the Appelate Authority for promotion is unfair. Furthermore, ex parte communications between the investigative and prosecuting staff, the Examiner, and the Appellate Authority are in violation of the A P A and result in Due Process violation of the law.

Petitioner seeks benefit of that provision of the A P A which requires an internal separation of functions within an agency. Due process in agency adjudications requires impartial decision makers.

The basis for this argument is contained in Ramspect v Federal Trial Examiners Conference, 345 U S 128 . The case discussed the legislative intent in the developement of the

Administrative Procedure Act (A P A) and the use of hearing examiners for formal hearings. It states as follows:

"Many complaints were voiced against the actions of hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed finding of fact and recommendations." ,See Ramspect, supra at 572.

The case further stated:

"Congress intended to make hearing examiners' a special class of semi-independent subordinate hearing officers' by vesting control of their compensation, promotion, and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees". See Ramspect, supra at 573.

The A. P. A. further developed the hearing examiners' position to be an Administrative Law Judge with quasi judicial powers. The Army and Air Force Exchange Service Hearing

Examiner and the hearing procedures used in this case at bar, violate the intent of congress, the A P A and constitutes a violation of the "Due Process" provision of the Fifth Amendment of the U.S. Constitution. Finally, the A, P. A. procedures, which were passed to insure that due process was provided to government employees in personnel actions, are not available to personnel of the Army and Air Force Exchange Service.

Taking note of the holdings in Bush v Lucas , 462 U S 367, the federal government has developed an elaborate scheme to insure due process is provided to federal personnel; however, this "scheme" was not available to the petitioner in this case. The procedural scheme developed by the Army and Air Force Exchange Service falls far short of that provided by the CSRA's provision of review by the Merit System Protection Board.

In Spagnola v Mathis, 859 F2d.223 (D C Cir.1988), rehearing in Banc granted, as in this case at bar, the government and the courts contend that the procedures provided to the plaintiff were in compliance with the due process provisions of the A P A .

Intera alia, this honorable court held in Spagnola at 229,230

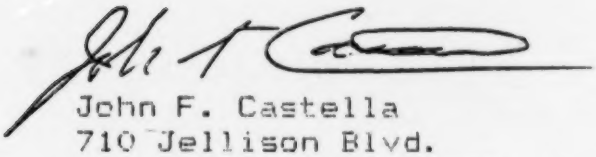
"While we decline to extend 'Bivens' remedies to Hubbard and Spagnola we do not suggest that the CSRA procedures precludes the jurisdiction over constitutional claims of federal employees... ...On the contrary, time and again the court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the vindication of their constitutional rights."

A careful analysis of the procedural and substantive due process afforded to the plantiff in this case results in the conclusion that there was none....only a "voluminous screen" to protect the agency in their irrational decision.

## CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, PETITIONER RESPECTFULLY PRAYS OF THE HONORABLE SUPREME COURT TO GRANT THE INSTANT PETITION FOR A WRIT OF CERTIORARI. PETITIONER FURTHER PRAYS for all relief to which he may show himself to be entitled, at law and in equity, and to a "formal hearing" by an independent examiner, as provided for in the Administrative Procedure Act.

Respectfully Submitted



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## CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of this Petition for a Writ of Certiorari was sent by first class mail to: Stafford Hutchinson, Assistant United States Attorney, 1100 Commerce St., Room 16G28, Dallas, Texas 75242 on April 22,1989 and June 20, 1989. In addition, a copy was sent to the Solicitor General, Clerk, U.S. Court of Appeals for the 5 th Circit, 600 Camp St., New Orleans, La., 70130.

JOHN F CASTELLA

# APPENDICES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 88-1406

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John Fred Castella,
Plaintiff-Appellant,

versus

John Edward Long
Personally and in his Official Capacity
as Commander, ARMY AND AIR FORCE EXCHANGE
SERVICE, ET AL.,
Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Texas

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ON PETITION FOR REHEARING

( JANUARY 23, 1989 )

Before GEE, WILLIAMS AND HIGGINBOTHAM, Circut Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above titled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT

J Williams
United States Circut Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No 88-1406
Summary Calander

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JOHN FRED CASTELLA,

Plantiff-Appellant,

Versus

JOHN E LONG, Personally and in his Official Capacity as Commander, HAROLD D. LYNCH, Personally and in his Official Capacity as Senior Management Official, ARMY AND AIR FORCE EXCHANGE SERVICE, THE UNITED STATES DEPARTMENT OF THE ARMY, AND THE UNITED STATES OF AMERICA.

Defendants-Appellees

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Appeal from the United States District Court
for the Northern District of Texas
(CA3-87-1141-H)

---

( November 21, 1988 )

Before GEE, WILLIAMS AND HIGGINBOTHAM, Circut Judges.

PER CURIAM:*

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* Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the puiblic and burdens on the legal profession." Pursant to that Rule, the court has determined that this opinion should not be published.

Appellant, Fred Castella, was discharged by the Army and air force Exchange Service (AAFES) for submitting false subsistence allowance vouchers in connection with a permanent change of station from Ft Devens Massachusettes, to AAFES Headquaters in Dallas Texas. His discharge was upheld through the appellate procedures within the AAFES, including a decision by an administrative law judge after an extensive and thorough hearing, and confirmed by General John E. Long, appellee, Commander, AAFES. Suit was brought in district court seeking review of the discharge and also claiming certain constitutional and statutory violation by the government. The district court granted summary judgement in favor of the defendants, the decision having the effect of upholding AAFES's discharge of appellant.

Appellant challenges the district court's decision only as to counts 4, 5, and 7 of his original complaint. Counts 4 and 5 alleged that AAFES and the Department of the Army violated the Privacy Act, 5 U.S.C. 552 (a) (e) (5) and (6), by intentionally and willfully failing to maintain the plaintiff's records in accordance with the requirements of that statute. Count 7 is the basic count challenging the legal justification for the decision to terminate on the ground that (1) there is no substantial evidence in the record to support the the decision, (2) the decision to terminate rather than some lesser form of disciplinary action was arbitrary, capricious, and an abuse of discretion, and (3) proper due process procedures were not followed in the administrative actions leading to the termination.

As to the issue raised under counts 4 and 5,we find that the district court made correct

application of the statute to facts of this case. Appellant relies upon the wording of the Privacy Act requiring that records about individuals be kept "with such accuracy, relevance, timeliness, and completeness, as is reasonably necessary to assure fairness to the individual in the determination." It is claimed by appellant that the dissemination of the records to the Texas Employment Commission was in violation of the law since the recordkeeping had not met the statutory requirements "to assure fairness to the individual".

The inaccuracy claimed by the apellant to exist in the records is the conclusion that he had falsified the travel vouchers. Appellant urges that this conclusion indicates guilt of a criminal offense, even though in this case there was only a decision to bring about his termination.

The district court was correct in concluding that the Privacy act claim is simply a collateral way of testing the fundamental issue in this case which is whether appellant did falsify the vouchers. If he did, there is nothing wrong with the accuracy of the records kept by the government. Only if his discharge were to be overturned because it was found there was not sufficient evidence to support the conclusion that he had falsified the records would there be an inaccuracy in those records. It is quite clear, therefore, that all appellant is doing in his Privacy Act claim is challenging the valididty of the discharge based upon the evidence and findings in the administrative process. There is no difference between this claim and the fundamental claim of count 7 challenging the basic decision to terminate on the ground of lack of sufficient evidence, undue harshness of penalty, and failure to use

fair procedures. Only if he prevailed under count 7 could he prevail under the Privacy Act counts 4 and 5. We turn our attention, therefore, to his appeal of the decision under count 7 of his petition because it raises the fundamental question in this case: was he justly discharged.

We find the decision of the distric court evaluating appellant's contention under count 7 to be completely effective and persuasive. We have considered those portions of the record which are relevant and have evaluated the circumstances throughly developed in the administrative procedure. We affirm the decision of the district court finding the submission of false vouchers with fraudulent intent. Our affirmance is based upon the opinion of that court. We go on merely to emphasize one or two matters by way of summary.

Appellant's claim of lack of sufficient evidence to support the decision [1] must fail because his attack is based upon his own credibility and the lack of persuasiveness of the government's evidence. The administrative law judge in the decision upheld by the head of the agency specifically found that appellant's testimony was not credible. The record contains ample evidence to support this conclusion. While it is not usual to require meal receipts in substantiating vouchers in the circumstances involved in station transfers and the subsistence allowance, the regulation is absolutely clear that the receipts can be required. Appellant's vouchers without the receipts indicated very high expenditures for meals. When he was told he had to supply receipts, he did supply some receipts and other receipts which he admittedly filled out himself "as estimates". The record shows beyond dispute that his

claims for meals are significantly higher than the usual claims of other

.....

[1]-- We have recently indicated that the standard of review in a case involving discharge of an AAFES employee is the "arbitrary and capricious" test of 706 of the Administrative Procedure Act. Castillo v. AAFES, 849 F. 2d 199, 203 n.1 (5th Cir. 1988). This decision was handed down after the decision of the district court in the case before us which was based upon the substantial evidence rule for review of administrative actions. The arbitrary and capricious test is obviously much harder to meet for an appellant attacking administrative action. Thus, just as the opinion in Castillo does, 849 F.2d at 203, we do not finally commit ourselves to the arbitray and capricious standard. We need not because the requirement of substantial evidence to support the administrative action clearly is met in any event.

employees being transferred into the Dallas headquarters. Further, his claims with respect to those meals where he did not have receipts are also significantly higher than the claims which are backed by admittedly authentic receipts. There also was evidence of clear and precise falsification of some vouchers thus establishing fraudulent intent.

Appellant himself testified extensively in the hearing held by the administrative law judge. under the law it was the obligation of the judge to evaluate his probity. In this evaluation the administrative law judge found appellant wanting. This is a decision which we cannot upset unless there is evidence which must be taken as showing this credibility decision fails in the record considered as a whole. There is not such evidence. Further, there are a number of other matters throughout the record which cast doubt upon the truthfulness and credibility of appellant. We

need not detail them since the credibility decision is not ours to make. It is enough that there is ample evidence in the record to justify the ALJ's conclusion as to credibility

In response to appellant's claim that the penalty of separation was unduly harsh in view of clear record in his 24 years of employment, it is certainly and uncontrovertible principle that the falsification of such records may appropriately lead to termination. Termination is well within the scope of administrative discretion.

Finally, the claims concerning procedural rights are lacking in substance. It is clear from the record that the step by step administrative procedures, including the full trail type hearing before an administrative law judge, complied with the regulations and also complied wuth constitutional and statutory requirements (emphasis supplied).

The decision of the District Court is AFFIRMED

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JOHN FRED CASTELLA,

Plaintiff

v.

JOHN EDWARD LONG, Personally and in his official capacity as Commander,

HAROLD D. LYNCH, Personally and in his official capacity as Senior Management Official,

ARMY AND AIR FORCE EXCHANGE SERVICE,

THE UNITED STATES DEPT. OF ARMY

THE UNITED STATES OF AMERICA

Defendants

Civil Action No. 3-87-1141-H

MEMORANDUM OPINION AND ORDER

Before the Court are Defendants' Partial Motion to Dismiss the Complaint, filed September 15, 1987; Plaintiff's Response, filed December 3, 1987; Defendants' Reply, filed Janauary 15, 1988; Individual Defendants' Separate Motion to Dismiss, or alternatively, for Summary Judgment, filed September 15, 1987; Plaintiff's Response, filed December 7, 1987; Defendants' Reply, filed January 13, 1988; Individual Defendants' Statement of Undisputed Facts and Issues of Law, filed September 15, 1987; Plaintiff's Response to Individual Defendants' Statement of Facts and Law, filed November 5, 1987; Plaintiff's Cross-Motion for Summary Judgment as to Count Six, filed December 3, 1987; Defendants' Response, filed January 22, 1988; Plaintiff's Reply, filed February 1, 1988; Plaintiff's Statement of undisputed facts and

Issues of Law, filed December 3, 1987; Defendants' Response to Plaintiff's Statement of Facts and Law, filed January 22, 1988; Defendants' Motion for Summary Judgment as to Count Seven, filed March 4, 1988; Plaintiff's Response, filed March 25, 1988; Defendants' List of Undisputed Facts and Issues of Law, filed March 4, 1988; Plaintiff's Cross-Motion for Summary Judgment as to Count Seven, filed March 4, 1988; Defendants' Response, filed March 25, 1988; Plaintiff's Reply, filed April 1, 1988; Plaintiff's Statement of Undisputed Facts and Issues of Law, filed March 4, 1988; Defendants' Response to Plaintiff's Statement of Facts and Law, filed March 25, 1988; and last, but certainly not least, 17 Volumes of the Administrative Record for the Administrative Proceedings pertinent to this case, filed September 15, 1987.

In their various Motions, Defendants are

seeking Dismissal for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Dismissal for failure to state a claim can be granted only when Plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Both parties have also filed numerous motions for summary judgment. Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

## FACTS

### A. Background Facts.

On July 25, 1985, Plaintiff, his wife, and three minor children began a permanent change of station (PCS) move from Fort Devens, Massachusetts to AAFES

Headquarters in Dallas, Texas. Amended Complaint, 11. Documents submitted by Plaintiff to AAFES reflect that he and his family commenced travel on August 7, 1985, arriving in Dallas on August 22, 1985, after making several authorized intermediate stops. Administrative Record ("Ad. Rec.") Vol. XIV, Tab 5. Under AAFES regulations, Plaintiff's family was authorized a subsistence allowance for lodging, food, and laundry expenses on the PCS move for the period they were occupying temporary quarters. Id. at Tabs 3 and 4. The temporary allowance was terminated on November 12, 1985, the date Plaintiff had his household goods delivered to his permanent quarters. Ad.Rec. Vol. XV, Tab 18 at 3-4.

On August 27, 1985, Plaintiff brought a draft subsistence voucher to Ms. Mulder, an accounting clerk in AAFES Comptroller Division. Ad. Rec. Vol. I at 38-

42, 60, 61. Ms. Mulder told Plaintiff to attach all lodging and dry-cleaning receipts when he submitted the finalized voucher. She also advised Plaintiff to save his meal receipts since they could be requested. Id. at 40. Plaintiff informed Ms. Mulder that he had not saved his meal receipts because no one told him to do so. Id. at 41-42.

The next day, Plaintifff returned and submitted his initial subsistence voucher covering the period from July 25, 1985 to August 27, 1985(Ad. Rec. Vol. XIV, Tab 5). Ad. Rec. Vol. I at 60. Sometime after September 17, 1985, Plaintiff submitted a second voucher (Ad. Rec. Vol. XIV, Tab 6). Ad. Rec. Vol. I at 43-44. Ms. Mulder examined the two vouchers and, based on her experience, believed the amounts claimed for meals were excessive. Id. at 43-44, 67, 71, 76. She consulted with her supervisor, Mr. Petrou,

received approval to request meal receipts from Plaintiff, and sent Plaintiff a written request for meal receipts to support his claims (Ad. Rec. Vol. XIv, Tab 23). Ad. Rec. Vol. I at 61-62; Vol. IV at 791.

At a later date, Plaintiff brought a memo (Ad. REc. Vol. XIV, Tab 24) and copies of some meal receipts (Ad. Rec. Vol. XIV, Tabs 17 and 18) to Mr. Petrou. Ad. Rec. Vol. IV at 791-95. Because the handwriting on the receipts appeared to be similar to that on Plaintiffs's voucher, Mr. Petrou asked Plaintiff if he had written the receipts. Ad. Rec. Vol. IV at 799. Plaintiff acknowledged that he had written in the amounts on some of the receipts. Id. Plaintiff states that he filled in the amounts to the best of his recollection. Id. at 803. Mr. Petrou then had Ms. Mulder compare the receipts submitted to the subsistence vouchers. Id. at 794-95. See

also Ad. Rec. Vol. XIV, Tabs 29 and 30

Subsequently, Mr. Petrou took the vouchers and receipts to his supervisor, Mr. Schulz, the Chief of the General Accounting Division. Ad. Rec. Vol. III at 408, 441. Mr. Petrou did not mention that the receipts were filled in to the best of Plaintiff's recollection. Id. at 441. After he reviewed the receipts and vouchers, Mr. Schulz concluded, based on his 20 years of experience as an auditor, that Plaintiff had submitted false vouchers, claiming money he had not spent. Id. at 420-21. he referred the matter to AAFES Safety and Security Division, who then referred the case to the Air Force Ofice of Special Investigation ("AFOSI"). Id. at 510, 553-54. AFOSI conducted an investigation and submitted a final report. Ad. Rec. Vol. XIII, Tab 13. AAFES Safety and Security later prepared a supplemental report. Ad. Rec. Vol. XV, Tab 9.

On October 22, 1985, prior to the initiation of the AFOSI investigation, Plaintiff submitted a third subsistence voucher. Ad. Rec. Vol. XIV, Tab 7. Because this voucher covered a period of time when Plaintiff was staying first at a hotel and then at an apartment, Mr. Schulz asked Plaintiff on November 7, 1985 to put his apartment expenses on a separate voucher. Ad. REc. Vol. III at 416-17; Vol. IX at 1600; Vol. XV, Tab 19. Plaintiff complied and on December 16 , 1985, he prepared and submitted a fourth voucher. Ad. Rec. Vol. XIV, Tab 8. On December 17, 1985, Plaintiff prepared and subsequently submitted a fifth and final voucher. Id., Tab 9.

B. Administrative Proccedings.

The statutory procedures generally applicable to federal employees subjected to separation for cause (see 5 U.S.C. 7513, 7701,

7703) are inapplicable to AAFES employees. See 5 U.S.C 2105(c). Instead, the applicable rights and procedures are provided by regulation. See Army Regulation (AR) 60-21/Air Froce Regulation (AFR) 147 -15 (reproduced in pertinent part at Ad. Rec. Vol. XIV, Tab 1).

Following his review of the investigative reports, defendant Colonel Lynch caused an Advance Notice of Separation for Cause to be prepared and issued to Plaintiff on February 24, 1986. Ad. Rec. Vol. XIII, Tab 1. The Advance Notice specified the basis for the proposed action and advised Plaintiff of his right to reply. Id. on March 3, 1986, Plaintiff submitted a written response to the Advance Notice through his attorney. Id. at Tab 4. Following considerable deliberation and consideration of Plaintiff's reply (Ad. Rec. Vol. VII at 1245-46), Colonel Lynch issued a Final Notice of Separation for Cause,

which was delivered to Plaintiff on March 12, 1986. Ad. Rec. Vol. XIII, Tab 6. Although some of the specific allegations of misconduct were resolved in Plaintiff's favor by Colonel Lynch, the Final Notice stated essentially the same basis for the action as appeared in the Advance Notice. Id. Plaintiff was separated on June 3, 1986. Amended Complaint, 2.

Plaintiff appealed Colonel Lynch's decision. Ad. Rec. Vol. XIII, Tab 8, An evidentiary hearing before Mr. Compton, an AAFES Hearing Examiner, began on April 28, 1986, and oontinued on April 29, 30, May 2, 5, 7, 9, 12, 13, and 14, and concluded on May 16, 1986. Ad. Rec. Vol. XVI, Tab D at 1. Following submission of post-hearing briefs by both counsel (Ad. Rec. Vol. XVI, Tabs E and F), Mr. Compton rendered a report including proposed findings and a recommendation that the separation for cause be confirmed. Id. at

Tab D. Thereafter, following review by AAFES Office of General Counsel (id. at Tab C), General Long reviewed the record, including the transcript, and, on December 1, 1986, adopted the findings and recommendation of the Hearing Examiner. Id.at Tab B. Generaly Long's decision constituted final adminsitrative action. AR 60-21/AFR 147-15, para. 3-39a.

COUNTS ONE, TWO AND THREE

In Count One of his Amended complaint, Plaintiff alleges that Colonel Lynch's and AAFES's negligent decision to terminate him resulted in a deprivation of a property interest without due process in violation of the Fifth Amendment. In Count Two of his Amended Complaint, Plaintiff alleges that General Long violated his right to due procees under the Fifth Amendment and the Administrative Procedure Act by participating

in the prosecutorial process leading to his terminantion and later siting as an "appellate authority" performing quasi-judicial functions. Further, Plaintiff contends that General Long's refusal to reinstate him resulted in a deprivation of property interest without due proccess in violation of the Fifth Amendment. In Count Three, Plaintiff alleges that AAFES, Lynch, and Long have deprived him of a liberty interest protected by the Fifth Amendment because they charged him with the commission of a felony and created a record of such wrongdoing.

Defendants contend that the constitutional tort claims in Counts One, Two, and Three are against AAFES and the individual Defendants in their official capacities are barred by sovereign immunity since the United States cannot be sued without its consent and it has not consented to suit for damages

arising from constitutional torts. E.g., Leham v. United States, 435 U.jD. 156, 160-61 (1981); Interfirst Bank Dallas, N.A. v. United States, 769 F.2d 299, 309 (5th Cir. 1985), cert denied, 475 U.S. 1081 (1986). Plaintiff claims that AAFES is not a sovereign; hence the claims against it, and presumably also against the individual Defendants in their official capacity, are not barred by sovereign immunity.

Plaintiff's argument that AAFES is not a sovereign is premised on the fact that AAFES is a non-appropriated fund instrumentality and, consequently, any award of damages against it would not come from the public treausury. However, the Supreme Court has held that AAFES is an arm of the government which is entitled to the immunities from suit enjoyed by the United States. Army and Air Force Exchange Service v. Sheehan, 456 U.S. 7

28, 733-34 (1982). See also, Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co, Inc., 632 D. 2d 680, 692 (7th Cir. 1980). The Court concludes that AAFES and the individual Defendants in their official capacity are immune from suit.

The individual Defendants further move this Court to dismiss Counts one, Two and Three against them in their personal capacity because these Counts are not barred by Bush.

The right of an individual citizen to sue for damages for alleged constitutional deprivations by a government official was established by the Supreme Court in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). However, the Court in Bivens cautioned that a damage remedy arising directly under the Constitution would not be implied where there were "special factors counselling hesitation in the absence

of affirmative action by Congress...". 1

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1. When the words "special factors counseling hesitation" were first used in Bivens, the Supreme Court illustrated its meaning by referring to Unites States v. Standard Oil Co., 332 U.S. 301, 311, 316 (1947) and United States v. Gilman, 347 U.S. 507, 509, 511-13 (1954). In Standard Oil, the Supreme Court concluded that issues involving federal fiscal policy would constitute a factor counseling hesitation. In Gilman, the Supreme Court concluded that issues involving the relations between the United States and its employees should be deferred to congressional policy determinations and, hence, would constitute a factor counselling hesitation. In summary, the special factors that the Supreme Court has recognized do not concern the merits of the particular remedy that was sought; rather, they related to the question of who should

Id. at 396. In Bush, the Supreme Court addressed the issue of whether a "special factor" existed so as to preclude judicial action on a damage suit where a government employee was suing a government agent for alleged constitutional violations asociated with his employment.

In Bush, a government employee sued his supervisor to recover damages for the alleged deprivation of his First Amendment rights caused by a disciplinary demotion. The Fifth Circuit concluded that the relationship between the Federal Government and its civil service employees was a special factor counselling against the judicial recognition of a damages remedy under the Constitution. Bush v. Lucas, 647 F. 2d 573, 576 (1981). In denying the availability of a Bivens

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decide whether such remedy should be provided. Bush, 462 U. S. at 380.

remedy, the Fifth Circuit noted that the role of the Government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens generally. Id. The Supreme Court agreed, emphasizing that the constitutional claims arose out of an employment relationship that was governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States. Bush, 462 U.S. at 368.

Although Bush involved a federal employee covered by the Civil Service Reform Act (CSRA) seeking damages for an alleged First Amendment violation, the Eleventh Circuit has specifically applied the Bush rationale to bar a Bivens suit in a case remarkably similar to the present case. Dynes v. Army and Air Force Exchange Service, 720 F. 2d 1495 (11th Cir. 1983). In Dynes, the plaintiff, an

employee of AAFES, brought suit against AAFES for allegedly violating his constitutional due process rights by its decision to terminate his employment. The district court granted AAFES summary judgment based on Bush and the Elleventh Circuit affirmed.

The plaintiff in Dynes attempted to distinguish Bush on two grounds. First, he argued that Bush's claim was based on a First Amendment violation, which his claim arose from a due process violation. Relying on the Supreme Court's analysis in Bush, the Eleventh Circuit declined to create a new remedy regardless of which constitutional right had allegedly been violated. Id. at 1498. The second distinguishing ground raised by the plaintiff was that his claim involved an employer/employee relationship governed by the AAFES regulations, rather than the civil service regulations applicable in Bush. The

Eleventh Circuit dismissed this distinction as inconsequential and noted that "[b]ecause Dynes is a federal employee whose claim arises out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, Bush v. Lucas dictates that the regulatory scheme not be supplemented with a new judicial remedy." Id. Plaintiff in the present case contends that the Elevent Circuit reached an erroneous conclusion.

The specific issue presented in this case, an AAFES employee seeking damages against his supervisors for alleged constitutional due process violations, has not been addressed by the Fifth Circuit. However, the Fifth Circuit has cited the Eleventh Circuit decision in Dynes with approval. Gremillion v. Chivatero, 749 F.2d 276, 278, n.9, 279 n.14 (5th Cir.

1985). The Fifth Circuit has also applied the Bush rationale to affirm a district court's dismissal of a federal employee's Bivens action alleging First and Fifth Amendment violation where the employee was subject to Veterans Administration regulations "which were specifically designed to offer less protection than the CSRA." Heaney v. United States Veterans Administration, 756 F.2d 1215, 1218 (5th Cir. 1985). In Heaney, the Court :

> [w]here a coordinate branch of the government has provided a government employee with a procedure under which a constitutional claim arising out of the employment relationship is congnisable and some measure of relief may be obtained, a nonstatutory damage action is not available for discharge, demotion or other adverse personnel actions absent clear evidence of an intent by the coordinated branch not to foreclose the

nonstatutory damage remedy.

Id. at 1220.

The Court concludes that Bush is controlling in the present case. "[A]n elaborate remedial system. . . has been constructed step by step" and Plaintiff should not be allowed to augment this system with a Bivens actions only where the remedial system was Congressionally created. As the court in Dynes concluded, AAFES disciplinary regulations satisfies the Bush requirement of an "elaborate remedial system."

COUNTS FOUR AND FIVE

In Counts Four and five, Plaintiff alleges that AAFES and the United States Department of the Army ("the Army") violated the Privacy Act, 5 U.S.C. 552a(e) (5) and (6). 2

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2 Plantiff brings Counts four and five under the juristiction provided by 5 U.S.C. sec 552a(g) (1) and (5).

Section 552a(e) provides in relevant part:

Each agency that maintains a system of records shall--

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b) (2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes; . . .

Plaintiff alleges that AAFES and the Army intentionally and willfully failed to maintain

Plaintiff's records in accordance with the above standard. Specifically, Plaintiff contends that AAFES and the Army improperly maintained the following documents:

(1) A "Serious Incident Report," prepared by the AAFES Safety and Security Diviision, dated December 24, 1985;

(2) A "Memorandum for Record," prepared by the AAFES General Accounting Office, dated February 21, 1986;

(3) An "Employer's Response to Initial Claim for Unemployment Compensation, "prepared by the AAFES Administrative Division--Personnel Branch, dated June 13, 1986; and,

(4) A "Memorandum of Inquiry--UA Misconduct--HQ AAFES," dated January 24, 1986.

Further, Plaintiff claims that AAFES willfully and intentionally disseminated the "Employer's Response" (document Number 3 above) and a "Memorandum for Commander" to the Texas Employment Commission ("TEC") in violation of Section 552 a(e)(6).

The graveman of Plaintiff's Privacy Act claims is apparently that he did not commit the fraud which was the basis for his discharge;therefore the agency records which alleged or concluded that he did are not accurate. 3

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3. Plaintiff contends that such documents, detailing AAFES's accusations, caused his discharge and caused him to accrue attorney fees for the TEC proccedings. However, the cause of Plaintiff's discharge was the agency's determination that he did commit the fraud; the documents in question merely memorialize this determination.

Plaintiff had sufficient opportunity provided by AAFES regulations to challege the determination that he committed the fraud. The Court concludes that Plaintiff's true aim in Counts Four and Five is to collaterally attack the correctness of the finding supporting the discharge decision.

Relying on Borrel v. United States International Communications Agenccy, 682 F. 2d 981 (D.C. Cir. 1982), Plaintiff contends that an aggrieved federal employee may bring an action under the Privacy Act, despite the fact that he may also have a complaint relating to an adverse personnel action. The Court agrees that a claim under the Privacy Act could in other circumstances coexist with a claim for an adverse personnel action. However, the Privacy Act claim must be more than an end run around an unfavorable agency decision. Moreover, the Court notes that in Borrell, the District of Columbia Circuit

never reached the issue of whether the plaintiff had sufficiently states a Privacy Act claim. The court concluded that the district court's findings were not specific enough and, therefore, they remanded the Privacy Act claim to the district court.

The Privacy Act allows for the amendment of factual or historical errors but is not a vehicle for amending the judgments of federal officials or of other parties as those judgments are reflected in records maintained by federal agencies. Pellerin v. Veterans Administration, 790 f.2d 1553, 1555 (11th Cir. 1986) (In Pellerin, the Eleventh Circuit did not specify the each subsection of 552a that was at issue). "Moreover, it may not be employed as a skeleton key for reopening consideration of unfavorable federal agency decision." Id. (quoting from Rogers v. United States Dept. of Labor, 607 F. Supp. 697 (N.D. Cal. 1985) (emphasis added by the Eleventh

Circuit). "The Privacy Act was not intended to shield [federal] employees from the vicissitudes of federal personnel management decisions." Albright v. United States, 732 F. 2d 181, 190 (D.C. Cir. 1984). Although Plaintiff strains to fit his case within the boundaries of the Privacy Act, his complaint really alleges only a wrongful personnel decision. See Hubbard v. United States Environmental Protection Agency, 809 F. 2d 1, 5, (D.C. Cir. 1986).

COUNT SIX

Plaintiff moves the Court for summary judgment on Count Six where he is seeking (1) a declaratory judgment that he is owed $7,695.84 unjustly withheld by AAFES, or (2) injunctive relief for recovery of the money, or (3) a determination that the taking of the $7,695.84 violated his constitutional due process rights. Before the Court can reach the merits of Plaintiff's summary judgment

motion, it must first determine the threshold question asserted by Defendants of whether Plaintif has alleged any proper basis for the Court's subject matter jurisdiction.

Both parties agree that the Court does not have subject matter jurisdiction over this claim absent a statute or other provision which clearly waives AAFES's defense of sovereign immunity. 4 Plaintiff contends that the Administrative procedure act (APA), 5 U.S.C. sec 701, et seq., provides such a waiver. Title 5 U.S.C. Sec 702 provides in relevant part :

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4. Plaintiff first asserts that AAFES is not "the sovereign" and is therefore not protected by sovereign immunity. The Court rejected this argument previously in this opinion. See supra at 8-9.

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee therof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . . (emphasis added). Plaintiff argues that his claim under Count Six is one for equitable relief (i.e. declaratory and injunctive) rather than for monetary relief; thus, 702 of the APA effects a waiver of AAFES's sovereign

immunity. The issue before the Court is whether Count Six should best be characterized as a claim for monetary or equitable relief.

The legal reasoning of the Fifth Circuit in Amoco Production Co. v. Hodel, 815 F. 2d 352 (5th Cir. 1987) is directly applicable to resolving this issue. 5

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5. The ultimate issue in Amoco was the same as the present case--whether to characterize a complaint as seeking monetary or non-monetary relief; however, the importance of this distinction was different. In Amoco, the plaintiff was attempting to avoid the Tucker Act's grant of exclusive jurisdiction to the Claims Court for monetary claims exceeding $10,000 by couching the complaint in terms of equitable rather than monetary relief. Since the Fifth Circuit's analysis of how to characterize the true nature of a claim is not directly tied to the Tucker Act, it is applicable to the present case.

In Amoco, the plaintiff sought declaratory and injunctive relief from a decision by a tribunal of the Department of the Interior ("DOI") assesing them extra royalties and penalties. The plaintiff argued that its aim in the case went beyond any eventual claim for a refund.6

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6. The plaintiff argued that the DOI's error in valuing the gas for royalty purposes would be perpetuated in future audits concerning that lease (and other leases) if the error was not corrrected by a court with jurisdiction to do so. Therefore, the plaintiff contended that obtaining a declaratory judgment establishing that the DOI's valuation was improper in order to prevent erroneous assessment was the main purpose of that lawsuit. Additionally, the plaintiff argued that it required an injunction against future use of the DOI's "erroneous" ruling. The plaintiff acknowledged that a remand to the

Id. at 358. In Amoco, as here, no monetary damages were sought, but in Amoco, as here, money would be the natural consequence of a decision favoring the plaintiff. Id. at 361, 365. Although admitting that Amoco presented a "close case," the court concluded that the plaintiff was essentially seeking monetary relief. Id. at 361, 368.

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DOI for a recalculation of its royalty obligations would facilitate a subsequent administrative refund request. Amoco, 815 F 2nd at 361.

The court reasoned that "the substance of the pleadings must prevail over their form."7 Id. at 361. In determining the true character of a claim, the court concluded that a court muust "search for the 'essence' of the claim." Id. at 362. A court must "undertake to discern the nature of the relief being sought and focus on the type of relief that will result from the action" in determining whether the claim is seeking monetary or equitable relief. Id. (emphasis added). The court attached great significance to the fact that once the plaintiff obtained the declaratory

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7. Although the Fifth Circit applied this statement on "the murky areas of Tucker Act jurisprudence," this court concludes that it is equally applicable anytime the true character of the claim is being questioned. Amoco, 815 F 2nd at 361.

judgment, the refund process would be instituted and a refund would be forthcoming.8

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8. In distinguishing Sarasota, Fla. v. EPA, 799 F. 2d 674 (11th Cir. 1986), the Fifth Circuit noted that a judgment in Sarasota in favor of the plaintiff would only result in a remand to the EPA to consider the grant application and would in no way automatically result in a monetary gain for the plaintiff. Amoco, 815 F. 2d at 366.

Id. at 365. In summary, the court concluded that the plaintiff's "primary objective" or "ultimate aim" was to obtain monetary relief. Id. at 362.

Although Plaintiff did not request monetary relief in Count Six, the Court must look beyond the form of the claim and focus on the type of relief that will result. Plaintiff readily admits that the "practical

effect" of a declaratory judgment would be to require AAFES to pay Plaintiff $7,695.84. Plaintiff's Cross Motion for Summary Judgment at 2. As in Amoco, once Plaintiff is armed with a declaratory judgment, the refund will be forthcoming. Clearly, the primary objective of Count Six is for Plaintiff to obtain $7,695.84. (9)

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9. Unlike Amoco, Plaintiff has not stated any lofty goals he seeks to obtain through his request for declaratory and injunctive relief other than monetary relief. See supra note 6 and accompanying text. This is not a close case.

Plaintiff contends that the practical effect of many of the Court's equitable judgments relating to federal agency actions result in a transfer of mony. Therefore, Plaintiff concludes "that it is not the

transfer of money per se, but the legal predicate to the cause of action which properly characterizes a claim for relief." Plaintiff's Reply at 4. The Fifth Circuit addressed this issue as well in Amoco. The court recognized that a claim is not automatically transformed into a claim for monetary relief just because money may lurk in the background. Id. at 366. However, the court distinguished suits which are "necessarily connected" with the payment of money from suits where the granting of equitable relief has the incidental effect of requiring payments to be made by the government. Id. at 363. As in Amoco, Count Six is necessarily connected with the payment of money. The payment of money by the government cannot be said to be an incidental effect in this case.

COUNT SEVEN

At long last the Court has arrived at

Count Seven, where Plaintiff seeks judicial review of the final agency decision sustaining his termination for cause from AAFES. Both parties filed motions for summary judgment on this Count and agree that the following three issues are to be decided by the Court: (1) whether the charges of misconduct sustained in AAFES's final decision are supported by substantial evidence in the administrative record; (2) whether the decision to terminate Plaintiff's employment, rather than some lesser form of disciplinary action, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and (3) whether AAFES observed the procedures required by law when removing Plaintiff.

A. Standard and Scope of Review.

The Fifth Circuit has held that a court's subject mater jurisdiction to review claims for non-monetary relief involving AAFES personnel decisions "flows from the confluence

of 28 U.S.C. 1331(a) and 5 U.S.C. 702. " Sheehan v. Army and Air Force Exchange Service, 619 F. 2d 1132, 1141 (5th Cir. 1980), rev'd on other grounds, 456 U.S. 728 (1982). While Section 702 provides the right of review, Section 706 provides the proper scope and standard of review under the APA. Section 706 provides in relevant part:

> The reviewing court shall--
>
> (2) hold unlawful and set aside agency ac[illegible] findings, and conclusions foun[illegible]o be --
>
> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.
>
> (B) contrary to constitutional right, power privilege, or immunity;
>
> (C) in excess of statutory jurisdiction authority or

limitations, or short of statutory right;

(D) without observance of procedure required by law.

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account

shall be taken of the rule of prejudicial error.

Both sides agree that the Court's review for Count Seven is confined to the administrative record at the time of the agency's decision. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414-20 (1971); see Defendants' Motion for Summary Judgment at 9; Plaintiff's Response at 9.

B. Were the Charges of Misconduct Against Plaintiff Supported by Substantial Evidence?

The findings of misconduct sustained in the final agency decision must be upheld unless the Court concludes from reviewing the administrative record that they are unsupported by substantial evidence. The Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolo v. Federal

Maritime Comm'n , 383 U.S. 607, 619-29 (1966) (quoting Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229 (1938). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Id. at 620.

In the final administrative decision, General Long adopted the Hearing Examiner's determinaton that Plaintiff had submitted falsified and fraudulent subsistence vouchers and receipts for temporary living expenses in violation of paragraphy 1-24, AR 60-21/AFR 147-15 (10)

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(10) "1-24. Falsification of records. a. Any employee who, for the purpose of concealing or misrepresenting a material fact, willfully or unlawfully alters, falsifies, or destroys, or causes to be altered, falsified, or destroyed official AAFES or other Government documents,

and 18 U.S.C. 1001. (11) Ad. Rec. Vol. XVI, Tab B; at 16-19. The court concludes that the agency decision was supported by substantial evidence in the record.

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records, or files, regardless of motive, is subject to separation for cause or other disciplinary action." Ad. REc. Vol. XVI, Tab D at 17.

(11) "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or documents knowing the same to contain any false, fictitious or fraudulent statement or entry shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. 1001.

The rules and regulations governing subsistence payments to AAFES employees are set out in the Exchange Service Manuals (ESM). Ad. Rec. Vol. XIV, Tabs 3 and 4. Under these provisions, AAFES will reimburse an employee's lodging, meal and laundry expenses while the employee is occupying temporary living quarters as a result of a permanent change of station. Id. However, the employee is entitled to reimbursement only for those allowable expenses he actually incurs. Id.

In order to obtain subsistence reimbursement, an AAFES employee is required to complete and submit a subsistence allowance voucher. Id. Receipts for meal expense are not always required to be submitted with the subsistence allowance voucher; however, if the amounts claimed for such expenses appear unreasonable or excessive, AAFES may require submission of receipts prior to reimbursement. Ad. Rec. Vol. XIV, Tab 3. If the employee is

requested to submit meal receipts and does not or cannot do so, claimed expenses may be disallowed or reduced to an amount determined to be reasonable. Id. Accordingly, employees are advised to keep meal receipts. (12)

General Long, by adopting the Hearing Examiner's findings, concluded that the subsistence vouchers were falsified and fraudulent. Ad. Rec. Vol. XVI, TAb D at 6, 11. Plaintiff contends that the itemized amounts on the vouchers were only estimates, but that the total accurately reflected what was actually spent. Ad. Rec. Vol. XVI, Tab D at 11; Vol. IX at 1427-28, 1590-91, 1602. Further, Plaintiff contends that some of the

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(12) Apparently, receipts are seldom requested by AAFES; howover, the ESM clearly advises employees to keep them See Ad. Rec., Vol. VIII at 1347-48; Vol. XIV, Ttab 4.

inaccuracies were accidental. Ad. Rec. Vol. IXk at 1469-70.

The Court concludes that the record contains substantial evidence to support the final agency action. For example, the record shows that Plaintiff's claimed meal expenses were consistently and considerably higher than expenses claimed by other AAFES employees who transferred to Dallas within the same time frame. Ad. Rec. Vol. I at 65-71; Vol. III at 517-18. In addition, the verifiable meal receipts for Plaintiff and his family during this time period reflected substantially lower expenditures than Plaintiff claimed on the vouchers. Ad. REc. Vol. XVI at 4; Vol. XIV, TAbs 12-20. As to one of the inaccuracies, Plaintiff contends he "forgot" to record a substantial credit he received on his hotel bill, even though (1) he submitted the claim less than three weeks after receiving the credit, and (2) he should have been reminded

of this credit because his "accounting system" should have been substantially out of balance for the amount of credit. Ad. Rec. Vol. XVI , Tab D at 7. These examples, as well as others throughout the record, clearly evince substantial support for the agency's charges of misconduct.

Much of Plaintiff's arguments in his Motion for Summary Judgment and his Response to Defendants' Motion for Summary Judgment rely on Plaintiff's truthfulness and credibility as a witness. Plaintiff testified at length in the administrative hearing and attempted to explain the numerous discrepancies and mistakes in his vouchers and to negate any evidence of intent to defraud AAFES or to falsify documents. Ad. Rec. Vol. IX at 1426-1621; Vol. X at 1684- 1877; Vol. XII at 2140-2255. The Hearing Examiner specifically found each of the proffered explanations unworthy of belief and generally

states that Plaintiff could not be relied on to be truthful. Ad. Rec. Vol. XVI, Tab D at 4-10, 18. The determination of the credibility of the witnesses is within the discretion of the presiding official who heard their testimony and saw their demeanor. (13)

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(13) The Court notes that Plaintif's behavior at times was obstreperous and detrimentally influenced the Hearing Examiner's opinion of his demeanor as an appellant and witness. On one occasion, the Hearing Examiner interupted Plaintiff's testimony to warn him that " . . .part of the things that I look for in these hearing is the demeanor of the witness and . . . you realize that . . . you are not helping yourself by behaving this way." Ad. Rec. Vol. IX at 1560. Another time, the Hearing Examiner asked Defendants' witness to leave the room and then admonished Plaintiff to please stop "mak[ing] faces at the witness" and further threatened

Griessenauer v. Dept of Energy, 754 F. 2d 361, 364 (Fed Cir. 1985). Here the Hearing Examiner credited the testimony of Defendants' witnesses and rejected Plaintiff's conflicting testimony. The record fully supports the Hearing Examiner's choice. Plaintiff has given us no convincing reason to reject those credibility determinations and we find no basis for doing so.

Plaintiff also argues in his Motion and in his Response that the Hearing Examiner ignored evidence which supported his case and that the Hearing Examiner continued to

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to terminate the hearing if plantiff could not comply with the warning. Ad. Rec. Vol. VI at 1017, His statements plainly indicated that this was not the first time Plaintiff had "made faces" at witnessess.

consider the general allegation of wrongdoing rather than limit his findings to the specific allegations of regulatory and statutory violations. (14) This court does not agree. The hearing Examiner's findings state that he considered "all matters of the record" (Ad. Rec. Vol. XVI, Tab D at 18, but found no evidence which convinced him that Plaintiff actually spent the amount he claimed on his subsistence vouchers.

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(14) In addition to specific allegations of violations, AAFES originally alleged that "all matters which are inconsistent, misstated, inaccurate in amount, or otherwise incorrect, form the basis for this action." Ad. Rec. Vol. XVI, Tab D at 10. Plaintif objected to this general charge because it failed to give him notice of the specific acts of misconduct with which he was being charged. Id. at 10-11

specificaly addressed the more salient of Plaintiff's evidence in a section titled "Evidence for the Appellant". (15)

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(15) A factfinder need not comment on or make specific findings regarding every piece of evidence or every argument advanced by a party. See Talley v. United States Postal Service, 720 F.2d 505, 507 (8th Cir. 1983), cert denied, 466 U.S. 952 (1984). Id. The Court concludes that Plaintiff's evidence was not ignored, but was merely found to be unconvinving. Further, the hearing Examiner states that he disregarded the general charge of wrongdoing and based his findings on specific charges. The court finds no reason to disbelieve him. In summary, even though there is some evidence in the record to support Plaintiff's case, the presence of some contrary evidence does not prevent an administrative agency's decision from being

C. Was the Penalty of Separation a Valid Exercise of Agency Discretion?

"It is old law, of course that an agency sanction within statutory limits can be upset only if it reflects an abuse of discretion." Haltmier v. Commodity Futures Trading Comm'n, 554 F.2d 556, 563 (2d Cir. 1977) (citations ommitted). Courts have expressed " a great reluctance . . . to become enmeshed in the disciplinary process [of an agency] and, accordingly, great deference is accorded to the sound discretion of the agency in such matters." Weston v. U.S. Dept. of Housing & Urban Development, 724 F.2d 943, 949 (Fed. Cir. 1983). Agency choice of sanction may constitute an abuse of discretion only in a narrow range of circumstances: if the sanction

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supported by substancial evidence. Consolo 383 U. S. at 620.

is "unwarranted in law or . . . without justification in fact . . . ." Butz v. Glover Livestock Comm'n, 411 U.S. 182, 185-86 (1973) (quoting American Power Co. V. SEC, 329 U.S. 90, 112-13 (1946)) The Court concludes that these circumstances are not present here.

Applicable AAFES regulations generally provide that an employee may be separated for cause if his or her on-the-job misconduct involves violation of laws, regulations, rules of procedures nad other lesser forms of discipline are determined to be inappropriate because the acts of misconduct are of such a nature that they are incompativle with the best interests of AAFES. Affidavit of Colonel Lynch, Attachment 2, AR 60-21/AFR 147-15, 3-4a and 3-8a. More particularly here, falsification of Government documents is expressly declared ot be an appropriae basis for separation for cause. Id. at 1-24.

In addition to the fact that Plaintiff's

separation is authorized by regulation, it is clear that numerous courts have held that separation is an appropriate penalty for Government employees who falsify travel and subsistence vouchers. E.g., Quinton v. Department of Transportation, 808 F.2d 826 (Fed. Cir. 1986); Tucker v. United Sates, 624 F.2d 1029 (Ct. Cl. 1980). Thus, the penalty here is plainly not unwarranted in law.

Further, although termination seems a harsh punishment for someone with an unblemished twenty-four year record, it is not without justification in facts. Colonel Lynch's decision to terminate Plaintiff was made only after a detailed (16)

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(16) Colonel Lynch estimated that he spent approximately twenty hours on reviewing this case and making his decision to terminate Plaintiff. Ad. Rec. Vol. VII at 1245.

review of the evidence, the specifics of the charges, Plaintiff's length of service, his previous employment reord, and other facts and circumstances pertaining to this case. (17)

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(17) The parties agree that the factors specified in Douglas v. Veterans' Administration, 5 M.S.P.B 313, 332 (1981) are relevant in determining the appropriateness of the penalty selected by the agency. The Douglas factors are: (1) the nature and seriousness of the offense, and its relation to the employee's duties , position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's past job level and type of

Ad. Rec. Vol. VII at 1242-46. The Court defers to Colonel Lynch's well-reasoned decision. See Ad. Rec. Vol. XVI, Tab D at 12.

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employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employees' past work level, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's abilty to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any appicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputaion of the agency;

D Were Procedures and rights afforded by the Constitution, Applicable Laws, and Regulations Observed?

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(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. The Court concludes that the factors which are relevant to this case were considered by Colonel Lyncch and, on the whole, weighed in favor of his decision to terminate Plaintiff's employment. See Ad. Rec. Vol. VII at 1242-46; Vol. XVI, Tab D at 12. See also Nagel v. Dept. of Health and Human Services, 707 F.2d

As set out above, AAFES has, in all material respects, followed the prescribed regulations governing separations for cause. See Supra at 6-7. These regulations satisfy minimal due process requirements. See Bush v. Lucas, 462 U.S. 367, 378 n. 14 386-88 (1983) (similar procedural scheme is "clearly constitutionally adequate"). The alleged deficiencies cited by Plaintiff in his Motion for Summary Judgment, his Response to Defendants' Motion for Summary Judgment, and his Response to Defendant's Statement of Undisputed Facts and Issues of Law (Filed November 5, 1987) did not deprive Plaintiff of his constitutional due process rights or any other right afforded by

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1384, 1386 (Fed. Cir. 1983) (the Douglas factors are not to be applied mechanically and consideration of irrelevant factors is not required)

applicable laws or regulations which were cited to the Court. Further, none of the cited deficiencies constitute prejudicial error. 5 U.S.C. 706. The extensive administrative procedure followed in this case more than adequately protected Plaintiff's rights under the constitution, laws, and regulations. (18)

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(18) The general charge, supra at 26 n.14, did not adequately provide Plaintiff with notice of the specific charges on which he was charged. However, as noted above, the Court can find no reason to disbelieve the Hearing Examiner's statement that the disregarded this charge when making his finding. Ad. Rec. Vol. XVI, Tab D at 10-11.

Conclusion

Defendants' Partial Motion to Dismiss is GRANTED. Individual Defendants' Separate Motion to Dismiss or, alternatively, for Summary Judgment is GRANTED. Plaintiff's Cross-Motion for Sumary Judgment as to Count Six is DENIED. Defendants' motion for Summary Judgment as to Count Seven is GRANTED. Plaintiff's Cross-Motion for Summary Judgment as to Count Seven is DENIED.

SO ORDERED.

DATED: April 29, 1988.

BAREFOOT SANDERS

ACTING CHIEF JUDGE

Northern District of Texas



ACTION OF APPELLATE AUTHORITY

In Re The

Appeal of Adverse Action of Mr. John F Castella

____1Dec 85_____
Date

My decision is based upon a review of the entire administrative record including the verbatim transcript, exhibits, briefs of the parties and the findings and recommendations of the hearing examiner.

I have determined that the hearing examiner's findings (Enclosure) are supported by the evidence of the record. I hereby adopt the hearing examiner's findings as my own.

The Appeal of the Final Decision of the Chief, Administration Division, HQ AAFES concerning the Separation for Cause of Mr. John F. Castella is denied.

The Separation for Cause is confirmed, effective 3 June 1986.

This Decision is final and not subject to further administrative appeal or review.

JOHN E. LONG
Major General, USA
Commander

EO (Ronnie D. Compton/3700) 3 September 1986

SUBJECT: Appeal of Adverse Action - Mr. John F. Castella

MEMORANDUM FOR: Commander

1. ACTION RECOMMENDED

Attached is the verbatim hearing transcript of an Appeal filed by Mr. John F. Castella, as a result of his Separation for Cause. I recommend the Appeal be denied and the Separation for Cause be confirmed. The attached action will accomplish the recommendation if you approve. Signature is recomended.

2. PROCEDURAL HISTORY OF THE CASE

a. An Advance Notice of Separation for Cause, dated 24 February 1986 signed by Colonel Harold D. Lynch, Chief, Administartion Division, HQ AAFES, was delivered to Mr. Castella on 24 February 1986. The basis was

Mr. Castella falsified official AAFES documents. Specifically, he submitted falsified subsistence vouchers and receipts for temporary living expenses for the period, 25 July 1985 through 16 November 1985.

b. Mr. Castella did reply to the advance notice in writing through his attorney, Mr. Joshua Turin, within the prescribed time.

c. Following consideration of the reply, a Final Decision, dated 11 March 1986, signed by Colonel Harold D. Lynch, Chief, Administration Division, HQ AAFES, was delivered to Mr. Castella on 12 March 1986. Some of the specific allegations against Mr. Castella were resolved in his favor by Colonel Lynch. The Final Decision, absent the allegations resolved in favor of Mr. Castella, stated the same basis for the action as appeared in the advance notice. The Final Decision specified that the action to be taken was Separation for Cause. The appellant was separated on 3 June 1986.

d.Mr. Castella is entitled to an evidentiary hearing and to appeal the Final Decision of the Chief, Administration Division, HQ AAFES, to you. Mr. Castella filed a timely appeal. His evidentiary hearing began on 28 April 1986, continued on 29, 30 April, 2, 5, 7, 9, 12, 13 and 14 May and ended on 16 May 1986.

e. You are required by regulation to secure the legal advice of your servicing General Counsel, prior to rendering your determination. This report and the attachments are forwarded through that office for review.

3. REMEDIES REQUESTED BY MR. CASTELLA

a. Withdrawal of all accusations of fraud and publication of a statement of retroactive retraction, evincing regard for the presumption of innocence of which Mr. Castella has been deprived.

b. Reinstatement to the position previously held by the employee.

c. Assumption by AAFES of all legal, administrative and investigative expenses incurred by Mr. Castella in the defense of his honesty and integrity.

d. Involuntary retirement with honor, in accordance with paragraph 3-28c., AR 60-21/AFR 147-15.

4. ISSUES

a. Did John F. Castella falsify subsistence vouchers for temporary living expenses for the period 25 July 1985 through 16 November 1985?

b. Did John F. Castella claim reimbursement for $181.80 lodging costs at the Holiday Inn, Leominster, MA, to which he was not entitled?

c. Did John F. Castella submit Hilton Receipt Number 24368 twice to support two different claims: (1) in the amount of $29.85 for 27 July 1985; and (2) in the amount of $68.40 for 29 July 1985?

d. Did John F. Castella submmit Singapore Restaurant Receipt Number 02378 in the amount of $68.15 dated 30 July 1985? Did Singapore Restaurant records show Receipt Number 02378 was used on 28 July 1985 and the charges were $34.65?

e. Did John F. Castella submit a Le Relais Restaurant Receipt Number 087412 in the amount of 68.40 for five meals dated 29 Aug 1985. Did restaurant records show Le Relais Restaurant Receipt number 087412 was used on 1 oct. 85 and the charges were 26.42 for two meals.

f. Where the receipts submitted by John F. Castella for meals allegedly eaten at the Howard Johnson's Restaurant on 27 and 28 July 1985 and 4 August 1985, while staying at the Holiday Inn, Leominster, MA, compared against restaurant records and not matched by amount and date?

g. Did John F. Castella submit a clearly altered gorcery receipt from Tom Thumb in the amount of $102.6?

h. Did John F. Castella submit a Monterey House Restaurant Receipt with an altered date?

i. Did John F. Castella violate paragraph 1-24, AR 60-21/AFR 147-15

j. Did John F. Castella violate 18 USC 1001?

k. Were the actions taken by the Army and Air Force Exchange SErvice in accordance with pertinent laws and regulation.

5. BACKGROUND FACTS:

a. On 25 July 1985, the Appellant, his wife, a daughter (age 11), and two sons (age 12 and 14) began a Permanent Change of Station (PCS) move from Fort Devans, MA, to Headquarters, Army and Air Force Exchange Service (AAFES), Dallas Texas. They commmenced travel on 7 August 1985, arriving in Dallas, Texas on 22 August 1985, after making several authorized intermediate stops. The Appellant was authorized a subsistence allowance for lodging, food, Laundry and dry-cleaning for

himself and his family in connection with the move. The allowance ended on 12 November 1985 when the appellant moved into permanent quarters.

b. Sequentially, the following events occurred in this matter. On approximately 27 August 1985, the Appellant took a subsistence voucher (Management's Exhibit [ME] 5) and his travel expense voucher (Appellants Exhibit [AL] 3) to Ms. Patsy Mulder, an Accounting Technician in the Comptroller Division (CM). The vouchers were in draft form and not ready for review. Ms. Mulder told the Appellant to attach all lodging and dry-cleaning receipts. She also told him to save his meal receipts. The Appellant said he did not save his meal receipts, because no one told him to do so.

c. The following day, the Appellant returned with the vouchers. He submitted another subsistence voucher sometime after September

1985 (Me 6). Ms. Mulder examined the two subsistence vouchers (MEs 5 and 6) and felt the amounts claimed for meals were excessive. She consulted with her Supervisor, Mr. Byron Petrou, and received approval to request food, laundry and dry-cleaning receipts from the Appellant (ME 23)

d. On 4 October 1985 , the Appellant brought a memo (ME 24) and some receipts to Mr. Petrou. The original receipts had been xeroxed in a collage format (For example see Hearing Examiner's Exhibit [HEE] 4, pages 25 and 26). Mr. Petrou had Ms. Mulder compare the receipts to the two subsistence vouchers (MEs 5 and 6) that had been submitted thus far. Ms. Mulder made a working copy of the two vouchers and compared the receipts to the amounts claimed (MEs 29 and 30). The amounts claimed on the vouchers were higher than the amounts on the receipts.

e. A few days later (before Ms. Mulder had completed her comparison), the Appellant returned to bring Mr. Petrou some more receipts and to check on payment of his vouchers. Mr. Petrou asked the Appellant who had written the amounts on some of the receipts. The Appellant told him he had filled in the amounts based on his best recollection of what he had spent. Mr. Petrou said this was O.K., so long as the receipts corresponded to what Appellant spent.

f. In late October, Mr. Petrou took the vouchers to his Supervisor, Mr. Walter E. Schulz, Chief, General Accounting, as a result of Ms. Mulder's findings. Mr. Petrou did not tell Mr. Schulz the receipts were the Appellant's estimates of what he spent. Mr. Schulz rearranged the receipts from the collage format into chronological order (ME 18). After reviewing the receipts and vouchers, Mr. Schulz felt the Appellant claimed money he did not spend. He referred the matter to the Safety

and Security Division (SS), who in turn referred the case to the Air Force Office of Special Investigation (AFOSI). A copy of the AFOSI Investigation is at HEE 13. Subsequent to the AFOSI Investigation, Mr. William H. Cafferty, Deputy Chief, Safety and Security, conducted a supplemental report. A copy of his report is at AE 9.

6. EVIDENCE PERTAINING TO THE BASIS OF THE ACTION

a. Management alleges the Appelant's subsistence vouchers and the receipts are false and fradulent. The Appellant ultimately submitted a total of five vouchers (MEs 5, 6, 7, 8, 9) plus some receipts, in support of MEs 5 and 6.

b. In the following paragraphs, I will first discuss the subsistence vouchers, and then the specific receipts that Management alleges are false and fraudulent:

(1) The Subsistence Vouchers:

(a) None of the amounts the Appellant claimed on his subsistence vouchers agree with what he actually spent on that date. At a minimum, I believe MEs 5 and 6 contain inflated claims for meals for the 30 day period covered by these two vouchers.

(b) On MEs 5 and 6 the Appellant's average breakfast claim was $24.36 for his family of five. This is $4.87 per family member for breakfast meals during the 30 day period. The Appellant's average lunch claim was 27.11. This is $5.42 per person for lunch meals during the 30 day period. The Appellant did not make a claim for breakfast or lunch on two days out of the 30 day period. The appellant's average dinner claim was $66.30 every day for 30 days. This is $13.26 per person. At a minimum, I do not believe an 11 year old girl and a 12 year old boy can eat that much food for such a sustained period of time.

(c) During his stay at the Holiday Inn, Leominster, MA, I was able to extract the following meals from his motel bill: ME 10, ME 11 and the back-up checks MEs 12, 13, 14, 15 and ME 16. I believe these are indicative of his familys eating habits.

| DATE | AMOUNT | MEAL | # OF PERSONS |
|---|---|---|---|
| 26 July | $6.72 | Breakfast | 2 |
| 26 July | 7.15 | Lunch | 3 |
| 26 July | 23.25 | Dinner | 5 |
| 27 July | 6.22 | Breakfast | 2 |
| 31 July | 2.31 | Breakfast | 1 |
| 31 July | 9.40 | Lunch | 2 |
| 31 July | 3.00 | ? | ? |
| 01 August | 9.12 | Lunch | 3 |
| 01 August | 7.78 | Lunch | 2 |
| 01 August | 20.00 | Dinner | 3 |
| 02 August | 3.52 | Breakfast | 2 |
| 03 August | 14.50 | Breakfast | 4 |

(d) The following verified receipts are part of the record.

so. Based on the known figures and the absence of verified receipts, I can only conclude he spent approximately $17.37 at breakfast, $19.26 at lunch and $36.63 at dinner. These figures are representative. The average expenditures claimed on Mes 5 and 6 show the following: $24.36 for breakfast, $27.11 for lunch and $66.30 for dinner. This leads me to believe he inflated his meal expenditures.

(h) The Appellant submitted three additional vouchers- ME 7 dated 22 October 1985, ME 8 dated 17 December 1985, and ME 9 dated 17 December 1985. ME 7 covered a period when the Appellant was staying first at a hotel then at an apartment. Mr. Walter Schulz asked the Appellant to put his apartment expenses on a separate voucher, which prompted ME 8. The amounts he claimed for meals for the same date on ME 7 went down overall when he transferred the figures to ME 8. Finally, his claims for meals on ME 9 are less when compared

to all the earlier vouchers. He testifies he was aware of the investigation at the time he completed MEs 8 and 9 and wanted to bring them in line with CM's award determination of $78.00 for meals. (See ME 25.) I believe these vouchers are also false in the sense that the amounts the Appellant claimed were not the amounts he spent on that particular day.

(i) The Appellant testified he began his PCS move with a known amount of cash money, although he did not count it to the exact dollar. He accounted for his reimbursable expenses by counting the amount of money he had left after each 10 days. he always subtracted his estimated non-reimbursables (i.e., gas, entertainment, and vacation stops enroute) from his expenditures for the particular period.

(j) He is not sure whe he did his first 10 day count, but he did write it

down on a note pad. He then used these figures for his subsistence vouchers. The crux of his defense is, the daily expenses are not necessarily accurate for a particular day, but they are accurate for the overall accountable period. He stated he has used this method for all of his 12 PCS moves. I do not believe this is a reasonable method to accurately account for travel expense.

(k) I conclude that all entries for meals on the five subsistence vouchers are false. I conclude the entries for meals on MEs 5 and 6 are fraudulently inflated, based on my analysis of the Appellant's known expenditures and the lack of any receipts to support the meals of $50.00 or more. I further believe the meal entries on ME 7 (which were completed prior to the AFOSI Investigation) that exceed the amounts I computed for the Appellant's meal expenditures are also fraudulently inflated. I believe that MEs 8

and 9, completed after the Appellant knew of the AFOSI Investigation, are more representative, although still false entries, of what he spent.

(2) The Receipts:

(a) Management set out seven specific examples of alleged irregular receipts. The following is Mangement's and the Appellant's relevant evidence on each allegation:

(b) Holiday Inn Receipt

1) Management alleged the Appellant claimed reimbursement for $181.80 in lodging costs at the Holiday Inn, Leominster, MA, to which he was not entitled. The Holiday Inn Receipt showed the Appellant was given $181.80 credit against his total bill. AE 1 is the receipt the Appellant submitted. ME 11 is the receipt obtained from Holiday Inn records by AFOSI. The credit represented two nights of

lodging at $90.90 per night. On ME 5 the Appellant did not show the credit, but rather claimed the full rate for eight nights of lodging. The Appellant testified he was given the credit, because one of his rooms was partially flooded. Upon mentioning this on checkout, the Manager gave him the credit. The Appellant testified he was submitting a large number of hotel receipts for this period and forgot about the credit. He simply extracted t he room rate, because there were a number of other charges on the bill, hence the error.

2) The Appellant's explanation seems unlikely. The $181.80 credit occured on 7 August, the day the Appellant checked out of the Holiday Inn. The Appellant prepared the voucher containing this claim on 27 August. The fact your hotel room floods and you are given a $181.80 credit seems like a memorable event, especially within three weeks.

Additionally, the Appellant's cash money should have been out of balance becuase he did not have this expense. I believe he was trying to get reimbursed for money he did not spend. The credit was so obscure on the bill that it was not noticed until well into the investigation. I believe the Appellant thought the voucher would be paid without notice of this windfall credit. I find this allegation is established by the evidence.

(c) The Hilton Receipts

1) Management alleged the Appellant submitted a Hilton Receipt number 24368 twice to support two different claims: (1) in the amount of $29.85 for 27 July 1985; and (2) in the amount of $68.40 for 29 July 1985. The Appellant did submit Hilton Receipt 24368 to support two different claims, neither of which were for meals eaten at the Hilton on those dates. The Appellant claimed $35.00 for lunch on 27 July 1985, and $80.00 for dinner on

29 July 1985. At the hearing the Appellant testified this receipt was obtained from the Hilton in Jekyll Island, Georgia. where he stayed while enroute to Dallas. The Appellant had one restaurant charge on his bill at the Jekyll Island Holiday Inn of $24.20. I believe he obtained the receipt for that meal. The Appellant, subsequent to the hearing, produced the original and duplicate copy of Receipt 24368. I have attached a copy. (See HEE 15.)

2) The Appellant testified as to all the commercial meal receipts that they were not meant to be an accurate representaion of his meal expense, but to only show he ate out commercially. He obtained receipts when it was convenient to do so. He kept them in an envelope. Upon CM's request for the receipts, he filled many out based on his best recollection of what his family would typically spend at that particular type restaurant.

3) He pulled the Hilton Receipt and its duplicate from the envelope without noticing it had the same number. He points out the two receipts were copied adjacent to each other on his original submission. Therefore, he could not have meant to defraud anyone.

4) There is no question this receipt does not represent the meals he ate on 27 or 29 July 1985, because he obtained it at Jekyll Island on 24 August 1985. There is no question the amounts on the receipt are false, because the Appellant admitted he simply estimated his typical meal expense. However, based on what I believe the Appellant typically spent for a lunch meal and dinner meal, I believe these receipts are inflated, false and fraudulent. Management alleged the Appellant submitted Receipt 24368 twice to support two different claims, apparently believing there was only one receipt. The evidence shows there

| RESTAURANT | AMOUNT | MEAL | # OF PERSONS |
|---|---|---|---|
| Luthers | 27.48 | Dinner | 5 |
| Luthers | 26.56 | Dinner | 5 |
| Monterey House | 32.67 | Dinner | 7 |
| Singapore | 34.65 | Dinner | 5 |
| Le Relais | 26.42 | Dinner | 2 |

(e) There are eleven individual breakfast meals set out above for a total of $33.27. This equals an average per person cost of $3.02. Extended by a family of five equals $15.10, and with an additional 15% tip, the amount is $17.37. There are 10 Lunches for a total of $33.45. This equlas $3.35 per person times five family members which equals $16.75 and with an additional 15% tip, the amount equals $19.26.

(f) There are 30 dinners for a total of $191.03 for an average of $6.37 per person. The $6.37 times five members equals $36.63. these figures are the little known

evidence I had concerning the Appellant's family's eating habits. I made some judgements from the actual tickets on whether the meal was a breakfast, lunch or dinner, depending on the time of day, number of members eating, and type of food.

(g) There are a series of recorded meals on hotel receipts that were attached to his travel expense voucher (AE 3). There are no actual restaurant receipts for these meals. Therefore, it is not possible to determine whether some or all of his family ate the particular meal. THese entries are $10.86, $11.00, $15.13, $17.45, $24.20, $39.58 and $43.12. The Appellant did not produce any verifiable receipts to support his dinner expenditures that were over $50.00. I believe it is likely the Appellant would have obtained at least one verifiable receipt over $50.00. I believe this, because he testified he randomly obtained receipts, when it was convenient to do

was, in fact, an original and duplicate receipt. My findings reflect this fact.

(d) The Singapore Receipt:

1) Management alleged that Singapore Restaurant Receipt 02378 (ME 17, page 2) was submitted in the amount of $68.15 for 30 July 1985, and the charges were $34.65. This is true. The variance was confirmed by the AFOSI from the restaurants's copy of the actual receipt (ME 19). The actual check was for five guests on 28 July 1985 for $34.65.

2) The Apellant testified he filled out this receipt based on what his family typically spent at a Chinese retaurant for dinner. This could not be true because this receipt represents what the Appelant actually spent at a Chinese restaurant for a family dinner. I find the actual expenditure on this receipt is close to the amount I calculated his family spent for dinners while

eating commercially. Finally, I find he used this receipt to support a claim of $80.00 for dinner on 30 July. I further note that on 28 July, the day he obtained the receipt from the Singapore Restaurant, he claimed $88.00 for dinner.

3) I conclude this receipt is inflated, false and fraudulent.

(e) The Le Relais Receipt:

1) Management alleged that Le Relais Restaurant Receipt 087412 was submitted in the amount of $68.40 for five individual meals eaten on 28 August 1985, but restaurant records show the guest check was used on 1 October 1985, and the charges were $26.42 for two meals. A copy of the receipt turned in by the Appellant is at ME 18, top of page 3. The actual restaurant record(ME 20) shows two guests at $26.42. Testimony showed the date is 1 October 1985, although the date cannot be determined from ME 20.

2) The Appellant testified he and his family ate at this restaurant located in the Plaza of the Americas five to eight times. They ate there initially while checking on ice skating lessons for his daughter at the Plaza of the Americas. They continued to eat there after the lessons began. Sometimes the entire family ate at the La Relais. At other times the children ate elsewhere in the Plaza, while he and his wife ate at the Le Relais.

3) Of all the receipts, this one disturbs me most. His $26.42 meal at the Le Relais occurred on Tuesday, 1 october 1985. He turned in the first batch of receipts on Friday, 4 October 1985. He was on notice as early as 23 September 1985 (ME 23) that receipts were going to be required for his vouchers. Yet, he obtains this receipt, that he has to know he is going to turn in, and writes in almost three times the amount he actually spent. I cannot draw any other

conclusion except this receipt is false, inflated and fraudulent.

(f) Howard Johnson's Receipts:

1) Management alleged the receipts submitted for meals eaten at the Howard Johnson's 'Restaurant on 27 and 28 July and 4 August 1985 were compared against restaurant records and could not be matched by amount and date. (SEe ME 17, pages 1, 2, and 3). The receipt for 27 July was for five guests at $67.32. The receipt for 28 July was for five guests at $21.12. The receipt for 4 August was for five guests at $17.50. These receipts were not seralized, nor did they contain an address identifying the Howard Johnson's Restaurant of origin. Agents of the AFOSI interviewed Mr. Brian S. Vysocky, Manager of the Howard Johnson's in Leominster, MA, where it was suspected the receipts originated. Although unknown to either Mr. Vysocky or the agents, it would have been impossible to match

the Appellant's receipts to any restaurant record because the amount was made up by the Appellant. Mr. Vysocky's search of restaurant records, of course, did not turn up any receipts that matched the ones submitted by the Appellant. Although Mr. Vysocky told the agents there were other Howard Johnson's in the area, no further checks were made. I suspect further checking would not have turned up any records that matched The Appellant's receipt.

2) Mr. Vysocky did subsequently present a statement (AE 8) wherein he states he was shown pictures of the Appellant's family. he recognized one of the Appellant's sons as being in the restaurant on several occasions. I do not question the Appellant ate in some Howard Johnson's Restaurant somewhere at sometime. I do not believe he spent the amounts claimed on these receipts on the date indicated. In that regard, they are false. I believe the 27 July receipt for $67.32 is

inflated. In that regard, I believe it is fraudulent. Finally, in my opinion, Management established this allegation as written.

(g) The Tom Thumb Receipt:

1) management alleged the Appellant submitted two Tom Thumb grocery receipts that are clearly altered. The Appellant submitted a copy of the original receipt. (See ME 21). This receipt is very confusing. At first it appears to be two separate receipts. Upon inspection, however, it appears to be one receipt folded in different ways, based on identical heading items and the data at the foot of each receipt. In reality it is, in fact, one receipt. The Appellant submitted th actual grocery tape during post hearing submissions.

2) I have made a copy of the actual grocery receipt and attached it at HEE 16. There is no question the Appellant

actually spent $102.06 at Tom Thumb, because he submitted his check into evidence (HEE 17). The question is not whether he spent the money, but whether he altered the receipt. I made copies of this receipt and folded it the way the Appellant apparently had to in order to produce the configuration at ME 21 (HEE 18). It wasn't easy, and I don't think it occurred by chance. Realizing the danger of confusing you and anyone else that reads this, I offer the following folding instructions. If you hold the receipt so that the typed Number 1 is above the typed Number 2 on the left of the receipt, you have the receipt that appears on the left of ME 21. For the receipt on the right, you fold the receipt so that the Number 1 is just above the 2 and the Number 3 is just above the 4. Additionally, the blank top of the receipt must be folded back. I believe the Appellant was trying to configure one receipt

so that it appeared to be two. The Appellant testified he does not recall how he folded the receipt. Logically, a reasonable man would probably fold the receipt double and copy each side. It can be done much easier that what the Appellant did. I know, because I did that too. Additionally, the Appellant obviously had the original receipt at the time he made the copy, and in fact, still had it throughout hte case. I don't know why he didn' submit it earlier. I conclude, based on the manner the receipt was presented and coupled with the complicated folding, that the receipt was altered from its original state. I believe the Appellant did this to increase the number of grocery receipts he submitted to support his claim. I do not go so far as to say it was clearly altered, becaused there is nothing clear about the receipts at all. Rather, I believe it was misleading on its face. My findings so reflect this conclusion.

(4) Evidence for the Appellant:

(a) The following is evidence for the Appellant, in addition to that set out above.

(b) The Appellant's main defense to the allegations is that he actually spent the amounts he claimed. In fact, he states he spent more than he claimed on his subsistence vouchers. The amounts he wrote on the receipts were only estimates, and were never intended to be accurate. I find no evidence in the record that convinces me he spent the amount he claimed for various meals.

(c) The Appellant raised a number of other issues in defense of the allegations. I have reviewed and carefully considered each one. I do not find any one, nor any combination of all of them, rise to the level of a legal excuse for the underlying basis of this action. An excellent brief of these

issues can be found in the Appellant's Brief in Support of Administrative Appeal. The brief is attached to the notebook that contains the exhibits.

(d) The Appellant called Lieutenant Colonel John F. Manning U.S. Army Retired, and a former AAFES employee who testified in part concerning the Appellant's character for truth and honesty. LTC Manning had the highest regard for the Appellant.

(e) Mr. Michael Beverly, Deputy Director, Purchasing Policy Directorate, also testified concerning the Appellant's character. He too, believed the Appellant had excellent character for honesty and integrity.

(f) The Appellant offered Character Statements from current and former AAFES employees, friends and military officers. All the statements are very laudatory of the Appellant. (See AE 22). Additionally, at page

(h) The Monterey House Receipt:

1) Management alleged and proved that a receipt from the Monterey House Restaurant had an altered date (Me 18, page 2). The Appellant acknowledged he wrote in a different date because he didn't see the printed date. I also note this receipt is probably for seven meals based on the items listed on the receipt.

2) I conclude the date entry is false, because clearly the Appellant did not eat at the Monterey House on the date he wrote on the receipt. Rather, he ate there on the date mechanically printed on the receipt.

(3) The General Allegation:

(a) Management alleged that all matters which are inconsistent, misstated, inaccurate in amount, or otherwise incorrect,

form the basis for the action. The Appellant objected to the general charge, because he was not given fair notice of the specific acts of misconduct that were being considered under this charge. Management agreed that this charge, standing alone, would not meet minimum due process requirements of fair notice to the Appellant. The Appellant conceded that other acts of the Appellant could be considered outside the specific allegation to draw inferences and to determine credibility.

(b) It is not necessary for me to consider this allegation to reach my recommendation in this case. Management alleged the subsistence vouchers were falsified and fraudulent. I believe they are, as set out above. Management alleged and proved the seven specific allegations (with two variations) concerning the receipts. I have disregarded this charge. I recommend that you also disregard it in reaching your decision.

33, HEE 4, the Appellant submitted a Character Statement from Mr. Martin R. Handel, AAFES Comptroller. Mr. Handel believes the Appellant has a , "High level of competence, professionalism and integrity."

(5) The Principal Management Official:

(a) Colonel Harold D. Lynch, Chief, Administration Division, testified he was the Management Official that separated the Appellant.

(b) Colonel Lynch believed the Appellant intended to draw the maximum subsistence allowance he was authorized. He does not believe the Appellant expended the amounts he claimed. He believes the Appellant fraudulently falsified his travel claims.

(c) Colonel Lynch considered the recommendation of the Appellant's Supervisior, Mr. James McKinney, that the Appellant should

be separated. He also considered the recommendation of Mr. Handel who thought the Appellant should not be fired.

(d) Colonel Lynch considered the options of reprimand, suspension and separation which were the disciplinary actions he believed were available to him. He decided that separaton was the only appropriate action. In reaching this decision he considered the offense to be major, but unrelated to the Appellant's position. He thought the variances between the receipts and vouchers could not have happened by accident. In his opinion, the Appellant should have known how to properly prepare the voucher. He believed the Appellant expected to gain from the transaction. Colonel Lynch did not compare this case with other similar cases, because he was unaware of any others. He considered that the Appellant's Supervisor believed the Appellant to be

b. The rebuttal evidence in this case centered around the appellant's business dealings concerning his home in the Duncanville area.

c. The evidence pertaining to the home obviously has little to do with the specific charges in this case. It should be considered with caution. The Appellant through testimony and doucuments put in evidence of his good character. When the Appellant places his good character in issue, as occurred here, Management does not have to sit idly by. Management's theory is that the Appellant wrongly obtained extensions of his subsistence period in order to remodel his home, by using the guise it had been severly damaged by the former tenants. The following evidence should be considered by you not to establish any part of the case on the merits, but as rebuttal evidence of the Appellant's claim of good character for truth and honesty. The Appellant

rented his house in Duncanville while he was assigned as the General Manager, New England Area Exchange. He found, upon his return, it had been damaged by the tenants and by various water leaks. He decided to have some remodeling done at the time he had the water and tenant damage repaired.

d. The Appelant was entitled to 60 days of subsistence upon his PCS move from New England. On 12 September 1985 he requested and was approved for an additional 60 days to terminate on 5 December 1985 (ME 22 ). His request was based on the unacceptable condition of his house caused by the former tenants. He asserted he had a 10,000.00 claim against his insurance company for the damage. He did not mention the remodeling of the house in his request (ME 22). Both LTC Manning and Mr. Beverly testified there was substantial damage to the house. There are some pictures of the damage at AE 20. The Appellant believed the

dishonest. He was not aware of any unusual pressures on the Appellant that would cause the Appellant to do the things he did. Colonel Lynch reviewed lesser penalties, but rejected each. He does not believe rehabilitation is in the best interest of the parties. Finally, he considered the Appellant's good performance, length of service and the fact he had not prior disciplinary record.

(e) Colonel Lynch testified it would have taken some documentary evidence to refute several of the specific allegations, and for him to be convinced the other mistakes were honest errors. Colonel Lynch stated no one tried to influence his decision. it was solely his.

(f) I do not substitue my judgement for that of the Management Official in cases where the factual allegations are established and the Management Official's

decision is not arbitrary, capricious or an abuse of discretion.

(g) In my opinion, Colonel Lynch made an informed decision based on the evidence he considered. I do not believe his decision was arbitrary, capricious or an abuse of discretion. I do not believe the two variations I made in my findings would have affected Colonel Lynch's Final Decision to separate the Appellant.

7. REBUTTAL EVIDENCE:

a. ESM 15-5 allows both parties to present rebuttal evidence, following the case on the merits. Boths parties availed themselves of this opportunity. Rebuttal e vidence is evidence given to explain, repel, counteract or disprove facts given in evidence by the adverse party.

work would take about 30 days, commencing about 15 September 1985.

e. Within this framework, Mr. Timothy R. Johnson, General Contractor, testified as follows: Approximately the first week of September 1985, he was contacted by the Appellant to inspect the house. He met with the Appellant and the Appellant's wife. They walked through the house. The Appellant told Mr. Johnson he wanted some remodeling done (to include a spiral staircase) and had wanted to, even before he left for New England. The majority of the work was remodeling, rather than repairing the damage. Mr. Johnson did see tenant and water damage in the house.

f. The Appellant wanted Mr. Johnson to meet with his Insurance Adjustor, Mr. John Yowell. Approximately a week later, Mr Johnson met with the Appellant, Mr. Yowell, and a second general contractor, obtained by Mr. Yowell. The Appellant told Mr. Johnson he

wanted him to be an unbiased contractor as he came through the house with the insurance company's contractor. Prior to submission of the bid, the Appellant told Mr. Johnson he wanted to get as much as he could out of the insurance company in order to reduce the amount he needed to borrow for remodeling. Mr. Johnson submitted his bid for $9,950.00 on 16 September 1985. (See ME 37.) The other contractor, Claude Jones of J.O. Lochridge Contractors, submitted his bid on 17 September 1985 for $8,882.91. (See ME 36.) Mr. Johnson testified he inflated his estimate at the Appellant's request. The insurance company generally pays on the lowest acceptable bid. According to Mr. Johson, assuming one bid (Lochridge) is honest, the inflated bid (Johnsons's) will cause the insured party to get as close to the true recovery as possible. If both bidders are competitively bidding, there is a possibility the lower bid will be

less than a full recovery. The Appellant, subsequently, contracted with Mr. Johnson for the repairs and remodeling (Me 38). There was not completion date stated in the contract. Mr. Johnson stated the Appellant told him he had all the time he needed because he worked for the Government and had a place to live. Mr. Johnson estimates it would have taken him two weeks to make the repairs without the remodeling. Mr. Johnson began work on approximately 18 September 1985. Mr. Johnson further estimates he could have completed, had it been repairs only, in the first week of October.

g. The majority of the work was completed by the end of October. During this period, Mr. Johnson went on a hunting trip. The work on the house continued through his subcontractors under the supervision of his superintendent. The Appellant claims this delayed the project. Mr. Johnson claims the

delay was due to the Appellants frequent changes. In early November, the Appellant told Mr. Johnson, "The heat is on, I have got to move in."

h. The Appellant and his wife did make a number of modifications or additions to the original contract. Eventually, the relationship deteriiorated over what Mr. Johnson would be paid to a point that the Appellant defaulted the contract.

i. mr. Johnson submitted a final bill amounting to $2,600.00 for the extra work that had been done. (See ME 40.) The Appellant rebutted the bill by claiming the contractor really owed him $317.00, after considering materials, amounts he paid others to accomplish work, and credit for discrepancies in the contract. (See ME 41.)

j. Mr. Johnson found the Appellant would not hold up to his word. MR. Johnson

testified the Appellant would tell a subcontractor something, but deny he did so when confronted.

k. For example, Mr. Johnson testified the Appellant initially stated the kitchen cabinets that had been installed by a subcontractor were acceptable. Several days later, he called Mr. Johnson complaining about them. The doors had been special ordered, but when they were installed, Mrs. Castella said that was not what she wanted. Mr. Johnson told the Appellant a remake of the doors would be extra. Later the Appellant refused payment for the cabinets. Mr. Johnson told the subcontractor he would not pay him until the Appellant was satisfied. The subcontractor tried, but failed, to satisfy the Appellant. The subcontractor evetually confronted the Appellant for payment. The Appellant told the subcontractor he had already paid Mr. Johnson as noted on the final check.

Mr. Johnson denies he was ever paid for the cabinets. Mr. Johnson has not paid the subcontractor. Mr. Johnson stated after working with the Appellant and his wife, he has learned to dislike them.

l. Mr. John R. Yowell, Farmers Insurance Group, testified on behalf of the Appellant that he first inspected the Appellant's house in early September 1985. It was untenantable at that time. He obtains contractors to estimate damages when he believes the repairs will esceed $5,000.00. He does not believe the house could be repaired in two weeks. He estimates at least 30 days or longer. He stated it is very common for an insured to remodel at the same time as he makes repairs. In fact, sometimes remodeling speeds up repairs, because instead of repairing a wall, you simply knock it out.

m. He did not know Mr. Johnson prior to this dealing. It is not unusual for one bid

to be higher than the other. He does not always accept the lowest bid. He considers which is the most acceptable, rather than which is simply the lowest.

n. He believes inflating a bid is a dishonest practice. Had he known Mr. Johnson inflate his bid, he would have gotten a third estimate.

o. Mr. Yowell usually finds the insured wants to list all potential claims as soon as possiple.. The Appellant was no different. Me 34 is a summary of charges the Appellant wanted coonsidered. It includes a claim for living expenses for 30 days at $170.00 a day. The Appellant told Mr. Yowell he was receiving living expenses from his employer. Mr. Yowell told him he could not have a double recovery. The Appellant did not pursue the living expenses claim. He later amended the claim in November from Living Expense to Lost Rent.

(See paragraph 5, ME 43.) Mr. Yowell suggested the claim for lost rent to the Appellant. Mr. Yowell testified the Appellant was honest with him from the beginning of the claim concerning the living expenses. Mr. Yowell recalls his company paid out some $23,000.00 on the claim. This recovery included both the tenant damage and the water damage. This amount is less than the actual damage due to deductibles and adjustments.

p. On cross examination, Management raised issues concerning the Appellant's claim for repairs to the house. AT paragraph 4d, ME 43, the Appellant made a claim to the insurance company in mid-October 1985 to, "Replace dry wall on garage side--tape, paint and texture $250.00." He claims, "These were charged to the undersigned by the contractor and not included inthe first claim." On ME 40, Mr. Johnson made demand for, "Sheetrock, tape, bed

- garage $200.00." On ME 41, the Appellant refused payment to, "Tape, bed sheetrock garage - work was completed by one man in less than one hour; never discussed with undersigned - O -."

q. The Appellant made an additional claim for installation of his dishwasher for $ 120.00 (paragraph 6e, ME 43). The contractor billed the installation at $50.00. (See ME 40.) The Appellant refused payment to the contractor for installation of the dishwasher. He claimed it was part of the contract. (See ME 41.) Mr. Yowell does recall he did not pay the full $120.00 that was claimed.

r. Mr. Yowell explained the Appellant's claim was handled as an estimate of necessary work. He does not care- whether the insured pays for the work or not, so long as it is actually performed.

s. In the pertinent parts of a Post

Hearing Affidavit (AE 25) requested by me, the Appelant denies he intended to remodel his house even before he was transferred to New England, because he put it up for sale. He denies he ever told Mr. Johnson anything about his intent to remodel.

t. The appellant denies he told Mr. Johnson that he wanted to get as much as possible from insurance coverage. He denies he told Mr. Johnson to inflate his damage estimate.

u. The Appellant states he had to deal with the subcontractors because Mr. Johnson was not available. The only time there was a supervisor present was during Mr. Johnson's hunting trip.

v. The Appellant says he first liked the cabinet work, but upon closer inspection, he found them unsatisfactory.

w. He claims it is Mr. Johnson's responsibility to pay the subcontractor for the cabinet work. He states he has paid the vast majority of Mr. Johnson's $26,125.00 bill. The reason he has not paid all the bill is due to his dissatisfaction with the repairs.

x. In my opinion, the rebuttal evidence submitted by Management seriously eroded the Appellant's evidence of good character for truth and honesty. First, the testimony of Mr. Johnson that the Appellant asked him to inflate the bid is strong evidence of dishonesty on the part of the Appellant. Although Mr. Johnson obviously committed a dishonest act himself, his testimony is very reliable evidence because it is a statement against his own interest. He has nothing to gain by this testimony and could be exponsed to adverse consequences for a fraudulent estimate to the insurance company. Secondly, the Appellant's dealing with Mr.

Johnson's demand for payment, when considered against the Appellant's insurance claim, appears dishonest to me. Finally, the remodeling consisted of a number of major changes in the Appellant's home to include a spiral staircase. (See ME 38.) I believe the Appellant intended to extend his subsistence period to allow time for this remodeling at the time he made the request for the extension. The Request for Extension was dated 12 September 1985. This is after he had met with Mr. Johnson to discuss remodeling. He did not mention remodeling in his request, but only repairs (ME 22). The repairs seem to be a legitimate reason to stay on subsistence. I do not think remodeling is a proper basis. However, I could not find any regulation setting out acceptable reasons for extension of subsistence. I believe he should have disclosed the fact he intended to remodel, in order for AAFES to make an informed decision

concerning the request for extension. In my opinion, his failure to disclose this basis for his request is dishonest and undercuts his credibility.

8. REGULATORY AND STATUTORY BASIS:

a. Management asserts the Appellant's actions violate paragraph 1-24, AR 60-21/AFR 147-15, Exchange Service Personnel Policies and The Federal Statute, 18 U.S.C. 1001.

b. The pertinent part of paragraph 1-24, AR 60-21/AFR 147-15 provides, "Any employee who, for the purpose of concealing or misrepresenting a material fact, willfully or unlawfully alters, falsifies, or destroys or causes to be altered, falsified, or destroyed official AAFES or other Government documents, records, or files, regardless of motive, is subject to separation for cause or other disciplinary action."

c. Section 1001 of Title 18, United States Code, is a Criminal Statute. The statute provides, "Whoever, in any matter within the jurisdiction of any department or agency of the united States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statments or entry shall be fined not more than $10,000 or imprisoned not more than five years, or both."

9. STANDARD OF PROOF:

The standard of proof for all findings in this matter is by a preponderance of the evidence. Paragraph 5.d., Exchange Service Manual (ESM, 15-5, defines that standard as, "...evidence that is of greater weight or more convincing

than the evidence offered in opposition to it that is, evidence which, as a whole, shows the fact sought to be proved is more probable than not."

10. ANALYSIS:

a. I have concluded the amounts the Appelant claimed for food on MEs 5, 6 and 7 are false, fraudulent and inflated. I further conclude the amounts the Appellant claimed for food on MEs 8 and 9 are false in the sense he did not actually spend the amount he reported for a particular day. I believe this violates paragraph 1-24, AR 60-21/AFR 147-15. I believe the Appellant intended to misrepresent the amount of his expenditures so as to receive the maximum authorized reimbursement. I believe he falsified the subsistence vouchers, which are official AAFES doucuments, to reach that goal. I further believe he expended some unknown amount of money during his period on subsistence allowance, both on items that were

reimbursab;e and items that were not reimbursable. In my opinion, the appellant sought to recover as much of or all of his expenditures for travel with reckless disregard for whether the item was reimbursable. His method of accounting for expenditures would certainly facilitate this recovery. Finally, I do not believe the receipts violated this provision, because they were not official AAFES documents until submitted. It appears the falsification of the receipts occurred while still in the hands of the Appellant.

b. The Criminal Statute 18, USC 1001, requires proof of five essential elements. In an administrative action each element must be established by a preponderance of evidence standard, such as set out above. There must be a statement, it must be false, material, made with a specific intent to decieve and within the agency's jurisdiction.

c. I believe the subsistence vouchers and receipts were statements. They were false as set out in this opinion. They were material, and within the jurisdiction of AAFES.

d. The critical element is the Appellant's specific intent. You should be satisfied it is more probable than not the Appellant intended to deceive when he submitted the vouchers and receipts. I conclude he did.

e. The purpose of the statute is so the Government can rely on the many representations made by individuals in the course of day - to-day business. In this case, I believe the fact the Appellant falsely reported expenses is a more serious matter than the amount of money involved. I believe his acts destroy his credibility as an AAFES executive. I simply could not rely on him to be truthful.

f. The Court in United States v. Myers, 131 F. Supp. 525(UDDC ND CAL 1955) set out to be what I believe to be the purpose of 18 U.S.C. 1001 when it said, "It (referring to 18 U.S.C. 1001) is in effect designed to insure to the whole world, governmental employees and the general public alike, that any record, document, instrument or statement made by a governmental employee, great or small, in his official capacity and in the course of his official duties can be relied upon by all."

g. I do not believe the Appellant's report of his subsistence expenses meets this standard.

h. This opinion is based on all matters in the record. It should not be used as a substitute for a complete review of the record. It represents my sole independent opinion.

11. FINDINGS: findings Number "c" and "g" differ from those set out in the Final Notice, based on evidence of record. I do not believe the variance would have affected the Final Decision to separate the Appellant. The Hearing Examiner finds from the evidence that:

a. John F. Castella did falsify subsistence vouchers for temporary living expenses during the period 25 July 1985 through 16 November 1985.

b. John F. Castella did claim reimbursement for $181.80 lodging costs at the Holiday Inn, Leominster, MA, to which he was not entitled.

c. John F. Castella did submit a copy of the original Hilton Receipt Number 24368 to support a claim in the amount of $29.85 for 27 July 1985 and a copy of the duplicate carbon of the original Hilton Receipt Number 24368 to support a claim in the amount of $68.40 for 29 July 1985.

d. John F. Castella did submit Singapore Receipt Number 02378 in the amount of $68.15 for 30 July 1985. Singapore Restaurant records showed Receipt Number 02378 was used on 28 July 1985, and the charges were $34.65.

e. John F. Castella did submit a Le Relais Restaurant Receipt Number 087412 in the amount of $68.40 for five meals on 28 August 1985. Restaurant records showed Le Relais Restaurant Receipt number 087412 was used on 1 October 1985, and the charges were $26.42 for two meals.

f. Receipts submitted by John F. Castella for meals allegedly eaten at the Howard Johnson's Restaurant on 27 and 28 July 1985 and 4 August 1985, while staying at the Holiday Inn, Leominster, MA, were compared against restaurant records and could not be matched by amount and date.

g. John F. Castella did submit an altered

and misleading grocery receipt from Tom Thumb in the amount of $102.06.

h. John F. Castella did submit a Monterey House Restaurant Receipt with an altered date.

i. John F. Castella did violate paragraph 1-24, AR 60-21/AFR 147-15.

j. John F. Castella did violate 18 U.S.C. 1001.

k. The actions taken by the Army and Air Force Exchange Service were in accordance with pertinent laws and regulations.

12. ALTERNATIVE COURSES OF ACTION:

You are not bound by the factual determinations of the Hearing Examiner, You may approve all or any portion of the findings. Neither are you limited to the recommendations of the Hearing Examiner and may take various actions or certain combinations of actions authorized by

the regulations when disciplinary action is supported by the evidence. The authorized actions are:

a. Verbal reprimand,

b. Written reprimand

c. Suspension,

d. Withdrawal of Executive Management Program (EMP) Status.

e. Disciplinary downgrade, and

f. Separation

RONNIE D. COMPTON
Hearing Examiner

APPROVED/DISPPROVED

JOHN E. LONG
Major General, USA
Commander